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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DINO ACACIO ARUCAN,

Defendant and Appellant.

H044848

(Santa Clara County
Super. Ct. No. C1520779)

A jury convicted defendant of stealing a handgun, unlawfully possessing the gun and ammunition on a later date, and misdemeanor drug offenses. The trial court found true the allegations that defendant had a prior strike conviction and had served a prior prison term. We find sufficient evidence to support the possession counts, and no error in the trial court's instructions or its adjudication of the strike prior. However, we accept the Attorney General's concessions that the theft conviction must be reduced to a misdemeanor for lack of evidence of the gun's value, the possession charges are subject to the prohibition against double punishment, and the trial court lacked authority to stay the one-year prior prison term enhancement. We also conclude the trial court violated the proscription against multiple punishments by imposing sentence on both the gun theft and gun possession counts. We will remand the matter to the trial court to reduce the theft conviction to a misdemeanor, and for resentencing.

I. BACKGROUND

Defendant was charged with first degree burglary (Pen. Code, §§ 459–460; count 1), grand theft of a firearm exceeding \$950 (§ 462, subd. (a); count 2), possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); count 3), possession of ammunition by a prohibited person (Pen. Code, § 30305, subd. (a)(1); count 4), misdemeanor heroin possession (Health & Saf. Code, § 11350, subd. (a); count 5), being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a); count 6), and possession of drug paraphernalia (Health & Saf. Code, § 11364; count 7). The information alleged defendant had served prison terms for two felonies (Pen. Code, § 667.5, subd. (b)) and had a strike conviction under the Three Strikes law for a violent or serious felony (Pen Code, §§ 667, subds. (b)–(i), 1170.12).

Trial Evidence

According to prosecution witnesses, defendant, a convicted felon, lived in a house with several other people. Described as a flop house, tenants and visitors came and went. The second floor was an attic with low ceilings, and a person named Dan¹ occupied the only room in that space. Defendant and his girlfriend slept nearby in an alcove. Needing money for an out-of-state move, Dan decided to sell a .45 caliber semiautomatic pistol. Impressed with the way Matt had cleaned defendant's gun, Dan asked Matt to clean the pistol before selling it to a registered gun dealer. He retrieved the gun from a storage unit, and after Matt cleaned it, he put the gun in a backpack in his bedroom. Defendant saw the gun when Dan give it to Matt to clean, and offered to buy the gun almost immediately. Defendant repeatedly asked Dan to sell him the gun. Having no success, he enlisted the help of a friend who came to the house and offered Dan \$600 cash for the gun. Dan again declined. He felt strongly about selling the gun to a dealer, and was uncomfortable rejecting the offers, especially when defendant's friend offered to drive

¹ We refer to the witnesses by their given names for anonymity intending no familiarity or disrespect.

him to the gun dealer the next day to ensure another opportunity to sell the gun if the dealer did not purchase it.

The next day defendant again inquired of Dan whether he would sell the gun to him or his friend, and Dan said no. Later that day, after Dan emerged from his bedroom and defendant left the house, the gun was stolen from Dan's bedroom. Dan was in the kitchen and heard Matt from his first-floor bedroom say, "Dino, Dino [referring to defendant], kids are coming down the tree, the side of the house." Dan ran upstairs. The hinged sky light in his room was open and the gun was gone. Dan then went outside to join Matt who reported he had chased after the kids as they ran down the street. Dan immediately reported the theft to a police officer on patrol in the area. A day or two later Dan saw defendant with the friend who had offered to buy the gun, and it made him nervous.

Three weeks later the gun was found in a backpack in a motel room occupied by defendant and his girlfriend. Officers also recovered ammunition and a glass pipe used to smoke methamphetamine. Defendant was arrested, 2.73 grams of heroin was found on his person, and his blood tested positive for methamphetamine.

Defendant subpoenaed Matt to testify at trial, and Matt had represented to a defense investigator that he would be on telephone standby. The investigator related through Matt's employer that Matt needed to be in court on a date certain during the trial, but Matt did not appear at trial.

Verdict and Sentencing

The jury found defendant not guilty of burglary, and guilty of grand theft and the remaining charges. The trial court found true the prior strike and one of the prior prison terms alleged. After denying defendant's motion to dismiss the prior strike, the court sentenced defendant to four years (double the middle term) on count 2, plus a consecutive 16 months (two-thirds the middle term) on count 3. In pronouncing sentence, the court stated its intent to run sentences for the gun and ammunition possession offenses

(counts 3 and 4) consecutive to count 2 but concurrent to each other because count 3 and 4 constituted “a separate set of operative facts.” Although it considered count 3 the “main” possession charge, it imposed a four-year sentence on count 4 “to be able to run it concurrent” to the total five-year four-month sentence. It observed that five years four months was “an appropriate sentence,” and to achieve that end it stayed imposition of the one-year prior prison term enhancement. Defendant was sentenced to concurrent one-year terms on the misdemeanors, deemed served with presentence credits.

II. DISCUSSION

A. SUFFICIENT EVIDENCE OF POSSESSION

Defendant challenges the sufficiency of the evidence supporting counts 3 and 4, the firearm and ammunition possession convictions. In reviewing sufficiency of the evidence claims, “we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Constructive possession requires that a person have “[c]ontrol over [the property] or the right to control it[,], either personally or through another person.” (CALCRIM No. 2511.) Dominion and control are essential elements of possession and cannot be inferred from mere presence or access. (*People v. Land* (1994) 30 Cal.App.4th 220, 224.)

Focused on the gun being found in a motel room on the bed next to his girlfriend in a closed backpack ostensibly belonging to her, and on the absence of evidence connecting him to the room such as clothing or toiletries, defendant argues that the prosecution failed to prove his constructive possession of the gun and ammunition. A detective observed defendant and his girlfriend outside the motel the day before the gun was found; he returned to the motel the next day after discovering both had outstanding

arrest warrants; and he spoke to the motel clerk who recognized their photos, described both “coming and going from the room,” and identified the pair as the only people associated with the room. Defendant answered the phone when the clerk called the room, he exited the room when she asked him to come to the front desk, and the room receipt was in his pocket along with the heroin. That evidence, together with evidence of defendant’s unrelenting interest in the gun while it was in Dan’s possession, shows more than mere presence or access to the gun. A jury could reasonably infer from the totality of the evidence that defendant not only stole the gun (or was involved in its theft), but that he had control over the gun or the right to control it in the motel room three weeks later.

B. NO INSTRUCTIONAL ERROR

A trial court has a sua sponte duty to instruct “on general principles of law relevant to the issues raised by the evidence and necessary for the jury’s understanding of the case.” (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) The duty to instruct sua sponte on a particular defense arises if it appears the defendant is relying on that defense or if substantial evidence supports a defense not inconsistent with the defendant’s theory of the case. (*Ibid.*) One of the prosecution’s theories supporting the theft count was that defendant conspired to steal Dan’s gun, and the trial court instructed the jury, consistent with that theory, with CALCRIM No. 416 (Evidence of Uncharged Conspiracy). Defendant argued that the prosecution did not meet its burden of proof because the evidence pointed to other reasonable explanations of the theft.

Defendant argues that the trial court prejudicially erred by failing to instruct with CALCRIM No. 419, regarding acts or statements completed before one joins a conspiracy. CALCRIM No. 419 provides: “(The/A) defendant is not responsible for any acts that were done before (he/ [or] she) joined the conspiracy. [¶] You may consider evidence of acts or statements made before the defendant joined the conspiracy only to show the nature and goals of the conspiracy. You may not consider any such evidence to

prove that the defendant is guilty of any crimes committed before (he/ [or] she) joined the conspiracy.” Citing *People v. Marks* (1988) 45 Cal.3d 1335, 1345, the accompanying usage note explains that the court has a sua sponte duty to give this instruction “if there is evidence suggesting that the defendant joined an alleged conspiracy after the crime was committed or after an act or statement was made to further the object of the conspiracy.”

In *Marks*, the defendant was charged with murder and conspiracy to commit murder, and evidence suggested that the defendant did not join the conspiracy until after the murder. (*Marks, supra*, 45 Cal.3d at pp. 1338, 1345.) The jury was instructed on several post-murder overt acts to support the conspiracy charge but was not instructed that the defendant had to have joined the conspiracy before the murder with the specific intent to commit the murder. (*Id.* at pp. 1338, 1345.) The case was reversed on other error, and the Supreme Court noted the sua sponte duty to instruct on general principles of law relevant to the issues raised by the evidence. (*Id.* at p. 1345.)

This case is distinguishable from *Marks* in that the prosecution’s conspiracy theory was based on pre-burglary/theft overt acts. The jury was asked whether defendant and another intended to agree and did agree to commit burglary and/or grand theft; whether at the time of that agreement defendant and another intended “that one or more of them would commit burglary and/or grand theft”; and whether to accomplish the burglary and/or grand theft, a coparticipant to the conspiracy committed one or more of the following alleged overt acts: entered Dan’s room without his permission; entered the room from outside the house; removed the gun from Dan’s backpack; closed the backpack to make it appear untouched. (CALCRIM No. 416.) No post-offense overt acts were alleged by the prosecutor or alleged in the defense case. Indeed, that would have been inconsistent with defendant’s theory that he did not possess the gun in the motel room. Nor is this a case where defendant entered the picture only after the gun was stolen. To the contrary, the evidence at trial clearly established defendant’s knowledge of and strong interest in acquiring the gun before it was stolen, consistent with conspiring

before the theft. On this record, neither the absence of direct evidence that defendant conspired to steal the gun nor the fact that the gun was later found in the motel room suggests that a conspiracy arose or existed *after* the gun was stolen or that defendant joined an ongoing conspiracy *after* the theft was committed.

Even if there was a sua sponte duty to instruct the jury with CALCRIM No. 419, and even if that error amounted to misinstruction on the elements of an offense (*People v. Hill* (2015) 236 Cal.App.4th 1100, 1122), the error would be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The conspiracy instruction, as given, made clear that defendant's culpability depended on his agreement to commit burglary and/or grand theft *before* the theft occurred, and the undisputed evidence shows a theft completed by the overt acts identified in the instruction. The evidence also shows defendant coveted the gun, tried to buy the gun, and that the gun was later found in a motel room occupied exclusively by defendant and his girlfriend.

Defendant argues that a question from the jury about whether someone is guilty of theft if he possesses a stolen item suggests the jury believed defendant's guilt was inferred from his mere presence in the motel room. He argues that without an instruction that he could not be liable for acts completed before he joined a conspiracy, the jury could not correctly apply CALCRIM No. 376 (possessing recently stolen property as evidence of a crime).

CALCRIM No. 376, given here, provides: "If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of burglary or grand theft based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed burglary and/or grand theft. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of

burglary or grand theft. [¶] You may also consider whether the defendant had the opportunity to commit the crime. [¶] Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt.”

We find nothing misleading about this instruction in relation to the court’s conspiracy instruction or the several theories of theft liability argued by the prosecution. CALCRIM No. 376 does not suggest, as defendant contends, that he could be found guilty of theft based on post-theft conduct alone. It instructs the opposite—that possession of stolen property is not by itself sufficient proof of larceny, but possession plus opportunity is sufficient so long as each fact essential to the offense has been proven beyond a reasonable doubt. Defendant’s acquittal on the burglary count does not alter our conclusion. We infer from it simply that the jury did not unanimously find defendant guilty of theft as a direct perpetrator or by aiding and abetting. The jury was instructed correctly on theft, and the acquittal of burglary does not suggest that the jury misunderstood or misapplied the instructions.

C. THE PRIOR CONVICTION ADJUDICATION

The trial court found true that defendant had been convicted of driving under the influence of alcohol causing bodily injury (Veh. Code, § 23153, subd. (a)) and that the offense qualified as both a serious and violent felony. Relying on *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), defendant argues the trial court exceeded the scope of permissible fact-finding by looking beyond the elements of the offense to find it a serious or violent felony. In *Gallardo*, our Supreme Court examined a judge’s authority to make findings necessary to characterize a prior conviction as a serious felony delimited by the Sixth Amendment. (*Id.* at p. 124.) The trial court in *Gallardo* found true that the defendant had been convicted of assault under Penal Code section 245, former subdivision (a), and the assault qualified as a serious felony for purposes of the Three Strikes law. (*Gallardo*, at p. 123; Pen. Code, §§ 667, subd. (a)(4), 1192.7, subd. (c)(31)

[an assault committed with a deadly weapon qualifies as a serious felony].) The trial court determined that the assault had been committed using a deadly weapon after reviewing the preliminary hearing transcript from the underlying proceeding. (*Gallardo*, at p. 123.)

Concluding that the trial court had exceeded its authority, the Supreme Court explained: “[A] sentencing court may identify those facts it is ‘sure the jury ... found’ in rendering its guilty verdict, or those facts as to which the defendant waived the right of jury trial in entering a guilty plea. [Citation]. But it may not ‘rely on its own finding’ about the defendant’s underlying conduct ‘to increase a defendant’s maximum sentence.’ ” (*Gallardo, supra*, 4 Cal.5th at p. 134.) The court further explained: “The trial court’s role is limited to determining the facts that were necessarily found in the course of entering the conviction. To do more is to engage in ‘judicial factfinding that goes far beyond the recognition of a prior conviction.’ ” (*Ibid.*) When a sentencing court “must rely on a finding regarding the defendant’s conduct, but the jury did not necessarily make that finding (or the defendant did not admit to that fact), the defendant’s Sixth Amendment rights are violated.” (*Id.* at p. 135.) The court held “that a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the ‘nature or basis’ of the prior conviction based on its independent conclusions about what facts or conduct ‘realistically’ supported the conviction. ... The court’s role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea.” (*Id.* at p. 136.)

The trial court here did not run afoul of *Gallardo* by determining that defendant’s driving under the influence conviction constituted a serious or violent felony. The conviction documents admitted in evidence include a certified copy of the information charging defendant with violating Vehicle Code section 23153, subdivision (a) by driving

under the influence of alcohol and proximately causing bodily injury to two victims (count 1); and violating Vehicle Code section 23153, subdivision (b) by driving with a blood alcohol level at or exceeding .08 percent and proximately causing bodily injury to the same victims (count 2). The information alleged two enhancements as to each count that defendant “personally inflicted great bodily injury on [victim] during the commission [of the offense] within the meaning of Penal Code section 12022.7” and the offense is a “serious Felony/Felonies, within the meaning of Penal Code Section 1192.7(c)(8).” A certified copy of the court’s minutes show that defendant pleaded guilty to counts 1 and 2 of the information and admitted the enhancements as to count 1. The count 2 enhancements were dismissed. A certified copy of the plea form shows defendant pleaded guilty to counts 1 and 2, and admitted the enhancements related to count 1. Defendant does not challenge the authenticity of the court records, which are presumed accurate. (*People v. Miles* (2008) 43 Cal.4th 1074, 1083 [“Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record and describing the prior conviction, is truthful and accurate”].)

Defendant is correct that the definition of driving under the influence causing injury to another under Vehicle Code section 23153, subdivision (a) sweeps more broadly than the definition of a “serious felony.” A conviction under Vehicle Code section 23153, subdivision (a) punishes acts that “proximately causes bodily injury,” while a serious felony requires that “the defendant personally inflicts great bodily injury on any person, other than an accomplice.” (Pen. Code, § 1192.7, subd. (c)(8); see also *People v. Wilson* (2013) 219 Cal.App.4th 500, 512 [“proximate causation and personal infliction are two different elements”].)

In a similar vein, defendant urges that his admission to a corresponding great bodily injury enhancement under Penal Code section 12022.7 does not establish a serious or violent felony for purposes of the Three Strikes law because that section contains

multiple subdivisions, not all of which include the necessary “other than an accomplice” language. But defendant’s admission was more specific. He admitted the enhancement as alleged in the information, including that his conduct came “within the meaning of Penal Code section 12022.7” *and* that the offense is a serious felony under Penal Code section 1192.7, subdivision (c)(8).²

In *Gallardo*, the sentencing court independently determined whether conduct qualified as a serious felony by relying on facts introduced at the preliminary hearing which were not admitted by the defendant when she entered a guilty plea. (*Gallardo*, *supra*, 4 Cal.5th at p. 136.) The trial court’s inquiry here was different. It relied on certified court records which facially established both defendant’s conviction *and* the basis for that conviction as a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(8). No factual inquiry was undertaken here because defendant’s admission qualified the offense as a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(8). *Gallardo* allows courts to identify facts admitted by a defendant in entering a guilty plea. (*Gallardo*, at p. 124.) The trial court here did precisely that, basing its determination that the prior conviction qualified as a serious or violent felony on defendant’s admission to the enhancement as alleged in the information.

D. SENTENCING ERRORS

Concessions

We accept the Attorney General’s concession that defendant’s theft conviction must be reduced to a misdemeanor. At the time the offense was committed in 2015,

² Penal Code section 667.5, subdivision (c)(8) defines a violent felony as including “[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7, 12022.8, or 12022.9.” Defendant’s admission that his conduct came within the meaning of Penal Code sections 12022.7 and 1192.7, subdivision (c)(8) thus also qualifies the felony as violent.

possession of a firearm valued at \$950 or less was a misdemeanor (former Pen. Code § 490.2; *People v. Perkins* (2016) 244 Cal.App.4th 129, 141), and no evidence was presented at trial that the gun was worth more than \$950.

We also accept the Attorney General’s concessions that separate punishment for unlawfully possessing the gun and ammunition (counts 3 and 4) is prohibited under Penal Code section 654, and that the trial court exceeded its authority staying the one-year prior prison term enhancement under Penal Code section 667.5(b). (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 [a prior prison term is mandatory unless stricken].)

Multiple Punishments—Theft and Gun Possession

Defendant argues that Penal Code section 654 prohibits separate punishments for stealing and possessing the gun (counts 2 and 3). “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment.” (Pen. Code, § 654, subd. (a). Undesignated statutory references are to this code.) Section 654 prohibits multiple punishments for a single “act or omission,” including a discrete physical act completing different crimes, and “a course of conduct encompassing several acts pursued with a single objective.” (*People v. Corpening* (2016) 2 Cal.5th 307, 311 (*Corpening*).) On undisputed facts, the question of whether the defendant harbors a single intent and objective presents a question of law. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Distinct crimes may be separately charged and result in multiple guilty verdicts, but sentence may be imposed “for only one offense—the one carrying the highest punishment.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

A single physical act for purposes of section 654 “depends on whether some action the defendant is charged with having taken separately completes the actus reus for each of the relevant criminal offenses.” (*Corpening, supra*, 2 Cal.5th at p. 313.) Defendant argues that section 654 prohibits multiple punishments for counts 2 and 3 because the theft offense “accomplished the actus reus” of the possession offense. The

defendant in *Corpening* was convicted of carjacking and robbery. On the facts of that case, the forceful taking of the vehicle containing rare coins completed the actus reus, or act requirement, for both offenses.

The facts here are distinguishable from those in *Corpening*. The theft and possession offenses constitute separate physical acts, and neither served as the other's actus reus. The offenses were separated in time; the theft was fully completed before defendant's possession three weeks later; and the later possession had not been completed by the earlier theft.

But in the alternative, defendant argues that multiple punishments for stealing and possessing the gun is barred under section 654 because, albeit different acts, they "comprise an indivisible course of conduct engaged in with a single intent and objective." (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.) Defendant analogizes the facts to those in *People v. Atencio* (2012) 208 Cal.App.4th 1239, where the defendant was convicted of stealing a gun and possessing it as a felon the next day, and the *Atencio* court described the events as "a course of conduct pursuant to one criminal objective—to possess the gun." (*Id.* at p. 1245.) Because the theft "was merely the means by which he gained possession" of the gun, only one act could be punished under section 654. (*Ibid.*)

The Attorney General urges it is unreasonable to consider offenses separated by more than three weeks to be a single course of conduct under section 654 and substantial evidence supports the trial court's finding that "[c]ounts 3 and 4 are a separate set of operative facts" from count 2, triggering consecutive sentences under section 667, subdivision (c)(6). But section 667, subdivision (c)(6) does not apply to count 2 as a misdemeanor, and we cannot meaningfully distinguish *Atencio*. The relevant inquiry is whether the offenses were incident to one objective, such that the two are treated as if they were a single act that violates more than one statute. (*Alvarado, supra*, 87 Cal.App.4th at p. 196.) Here the evidence establishes a single objective to possess the gun, which was realized by stealing the gun. We see no evidence that the passage of time

altered defendant's "intent and objective such that his course of criminal conduct can be deemed to consist of more than one act for purposes of section 654." (*Atencio, supra*, 208 Cal.App.4th at p. 1244.)

Remedy

As between the gun and ammunition possession counts, defendant argues that imposition of punishment on count 4 (possessing ammunition) should be stayed. And as between the theft and gun possession counts, defendant argues that imposition of punishment on count 3 (gun possession) should be stayed. He also argues the prior prison term enhancement should be stricken. His proposed remedies are inconsistent with the scope of resentencing when a principal felony conviction (here, the gun theft) cannot stand.

When a conviction underlying the principal term is reversed (or, as here, reduced to a misdemeanor), the matter is remanded for the trial court to "select the next most serious conviction to compute a new principal term." (*People v. Bustamante* (1981) 30 Cal.3d 88, fn. 12.) In so doing, "the trial court retains jurisdiction over the entire cause as needed to make necessary modifications in the sentence" and can modify sentence as to the other counts as well. (*Ibid.*; see also *People v. Sellner* (2015) 240 Cal.App.4th 699, 701–702.) The trial court has authority to consider anew its sentencing choices and is not limited to merely striking illegal portions. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258; accord *People v. Navarro* (2007) 40 Cal.4th 668, 681.) We will remand for resentencing consistent with those principles.

III. DISPOSITION

The judgment is reversed. The matter is remanded for the trial court to reduce count 2 to a misdemeanor, and for resentencing. The trial court shall designate a new principal term and reconsider all sentencing choices consistent with this opinion and under Penal Code section 654. The court shall impose or strike (but not stay) the one-year prior prison term enhancement.

Grover, J.

WE CONCUR:

Greenwood, P. J.

Bamattre-Manoukian, J.